

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

UNITED STATES POSTAL SERVICE

and

Case 13-CA-078058

CATHERINE BODNAR, an Individual

BRIEF OF COUNSEL FOR THE ACTING GENERAL COUNSEL

I. INTRODUCTION

The United States Postal Service, herein Respondent, provides postal services for the United States and operates various facilities throughout the United States in the performance of that function, including a facility located in Highland, Indiana.

Respondent's long term employee Catherine Bodnar, was issued a Notice of Removal on March 22, 2012, to be effective on April 27, 2012, because Ms. Bodnar refused to answer questions during a postal investigation after Respondent denied her request for union representation. The matter was subsequently grieved under the parties' grievance procedure and the Arbitrator ordered that Ms. Bodnar be reinstated with backpay and benefits but denied overtime as, consistent with the past practice of the parties, no evidence that she was entitled to overtime during that period was presented at the arbitration. Counsel for the Acting General Counsel urges that the Administrative Law Judge should not defer to the arbitration award as it is repugnant to the Act because it has not made Ms. Bodnar whole. The award penalizes Ms.

Bodnar who but for Respondent's unlawful conduct would have been entitled to overtime during that period.

In the alternative, Counsel for the Acting General Counsel is also urging that the Administrative Law Judge give greater weight to safeguarding employees' statutory rights under Section 8(a)(1) and (3) of the Act by modifying the current approach to post-arbitral deferral cases in cases such as this, where the arbitrator has failed to apply the correct statutory principles.

II. PROCEDURAL POSTURE

Upon a charge filed by Catherine Bodnar, herein Ms. Bodnar, on April 3, 2012, and after an investigation of the allegations therein, Region 13 of the National Labor Relations Board, herein the Region, deferred further processing of the charge under *Collyer Insulated Wire*, 192 NLRB 837 (1971), by letter dated June 4, 2012.

On October 11, 2012, pursuant to a grievance filed by Ms. Bodnar, the matter was heard by an arbitrator. The arbitrator's decision and award issued on November 27, 2012. The arbitrator reinstated Ms. Bodnar with backpay and benefits, but denied overtime on the basis that no evidence of overtime eligibility was presented at the arbitration. Thereafter, the Region determined that it would not defer to the arbitrator's award. Consequently, on May 14, 2013, the Region issued a Complaint and Notice of Hearing. The Complaint alleged that on February 27, 2012, Respondent denied Ms. Bodnar's request for union representation at a meeting which Ms. Bodnar had reasonable cause to believe would result in disciplinary action and continued with the interview. The Complaint further alleged that Ms. Bodnar refused to answer the questions during the interview without union representation and was subsequently issued a Notice of

Removal on March 22, 2012, and was removed from her position on April 27, 2012, because of her refusal to answer questions without union representation in violation of Section 8(a)(1) and (3) of the Act.

On July 31, 2013, the parties entered into a joint motion waiving a hearing and requesting that the Administrative Law Judge issue a decision in this matter without a hearing based solely on the stipulated record. The parties further stipulated that as the Respondent had admitted all allegations alleged in the Complaint, the issues to be determined by the Administrative Law Judge were as follows:

- (a) Should the Board defer to the Arbitrator's award reinstating Ms. Bodnar with backpay and benefits and denying overtime on the basis that no evidence that she was entitled to overtime was presented at the arbitration as consistent with *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), and *Olin Corp.*, 268 NLRB 573 (1984);
- (b) Is deferral to the Arbitrator's award reinstating Ms. Bodnar with backpay and benefits and denying overtime inappropriate because the award is repugnant to the Act pursuant to *Spielberg Mfg. Co.*, supra.

On August 6, 2013, the Administrative Law Judge granted the motion and approved the stipulation of facts submitted by the parties and set a deadline for the filing of briefs.

III. THE FACTS

The underlying facts are contained in the arbitrator's decision, which is incorporated by reference into the Stipulation and have been admitted to by the Respondent.

A. Respondent denies Ms. Bodnar union representation during an interview she believed could lead to discipline and issues her a Notice of Removal for her refusal to answer questions without union representation.

Catherine Bodnar has worked for the Postal Service for 17 years. Ms. Bodnar is a postal carrier and has worked at the Hammond Post office at the Hammond and Highland Park branches. She is represented by the National Association of Letter Carriers, Branch No. 580.

She is a union steward and has held several positions with the union including Chief Steward, Director of Legislation, Vice President and President. On February 27, 2013, Supervisor Sharon Swart called Ms. Bodnar into her office to interview her regarding an allegation of misconduct that had been made against her by another employee. Ms. Bodnar requested that a union steward be present. Supervisor Swart denied the request and informed Ms. Bodnar that she did not have the right to union representation, that she had to answer the questions and that failure to do so could result in discipline up to and including termination. Ms. Bodnar refused to answer Supervisor Swart's questions without a union representative. On March 22, 2013, Ms. Bodnar was issued a Notice of Removal with an effective date of April 27, 2012, for refusing to cooperate with a postal investigation and was subsequently removed from her position.

B. The Arbitrator's Award

Pursuant to a grievance filed by Ms. Bodnar, a hearing was held before Arbitrator Karen H Jacobs, herein the Arbitrator, on October 11, 2012, where the parties had the opportunity to examine and cross-examine witnesses and to introduce exhibits and file post-hearing briefs with the Arbitrator. On November 27, 2012, the arbitrator issued her decision¹ which found that the Postal Service had not carried its burden of proof and did not have just cause to issue discipline to Ms. Bodnar for not participating in Supervisor Swart's postal investigation. The Arbitrator dismissed the charges in the Notice of Removal and directed that they be expunged from her record. The Arbitrator ordered that Ms. Bodnar be reinstated to her former position and made whole with full back pay and benefits. The Arbitrator found that although the remedy requested by the union included overtime, there was no evidence that she would have been working

¹ The Arbitration Award is attached to the parties' stipulation as Exhibit 9, and all references to the Award are cited herein as Exh. 9., followed by the relevant page number.

overtime had she been working during that time and therefore, overtime was not included in the award. (Ex. 9, page 1). However, the practice of the parties in arbitration proceedings is to determine overtime eligibility after an award issues. (Stipulation of Facts ¶18).

After reviewing the Arbitrator's award and considering the positions of the parties, the Region resumed processing of the case and issued a Complaint and Notice of Hearing alleging that Respondent had terminated Ms. Bodnar in violation of Section 8(a)(1) and (3) of the Act. Subsequently, Respondent filed an Answer to the complaint admitting all complaint allegations; thus it is undisputed that Respondent discharged Ms. Bodnar in violation of Section 8(a)(1) and (3) of the Act.

IV ANALYSIS

A. It is inappropriate for the Board to defer to the Arbitrator's decision because the award is clearly repugnant to the Act.

The Board's standard for deferring to an arbitration award was established in *Spielberg Mfg. Co.*, 112 NLRB 1980 (1955). The Board will defer to an arbitration award if: (1) all parties agreed to be bound by the decision of the arbitrator; (2) the proceedings appear to have been fair and regular; and (3) the award is not clearly repugnant to the purposes and policies of the Act. The Board has further conditioned deferral on the arbitrator having considered the unfair labor practice issue. *Raytheon Co.*, 140 NLRB 883 (1963). The unfair labor practice issue will be found by the Board to have been adequately considered, if the contractual issue is factually parallel to the unfair labor practice issue and the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. *Olin Corp.*, 268 NLRB 573 (1984). The "clearly repugnant" standard requires that the award not be "palpably wrong," i.e. not susceptible to an interpretation consistent with the Act. It does not require that the arbitration award be totally

consistent with Board precedent, *Laborers Local 294* (AGC of California 287 NLRB 1107, 1111 (1988)). Neither does it require that the arbitrator “decide a case the way the Board would have decided it”. *Aramark Services, Inc.* 344 NLRB 549, 549 (2005). The party opposing deferral has the burden of demonstrating that the standards for deferral have not been met. *Olin Corp.*, *supra* at 574.

There is no dispute that arbitration proceeding in the instant case was fair and regular or that the parties agreed to be bound. Likewise, the arbitrator considered the unfair labor practice as it was factually parallel to the contractual issue that was presented and the arbitrator was presented with the facts relevant and necessary to resolving the unfair labor practice issue. Thus the only issue to examine is whether the Arbitrator’s decision was clearly repugnant to the Act.

Section 10(c) of the Act states that the Board shall order those found to have committed an unfair labor practice “to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies” of the Act. The Board has “broad discretionary” authority under Section 10(c) to fashion appropriate remedies that will best effectuate the policies of the Act.² The underlying policy of Section 10(c) is “a restoration of the situation, as nearly as possible, to that which would have obtained but for [the unfair labor practice]”.³ The Board has found an award or settlement is repugnant to the Act if the grievant was solely engaged in protected activity and the award or settlement did not provide for a full remedy, including backpay. See, e.g., *Cone Mills Corp.*, 268 NLRB 663-664 (1990). Deferral to such an award would have the effect of penalizing employees for engaging in those protected activities that the arbitrator found precipitated her discharge, a result which is plainly contrary to

² *NLRB v. J. H. Rutter-Rex Mfg.*, 396 U.S. 258, 262-263 (1969).

³ *Latino Express, Inc.*, 359 NLRB No. 44 (2012). *Trustees of Boston University*, 224 NLRB 1385, 1385 (1976), *enfd.* 548 F.2d 391 (1st Cir. 1977).

the Act. *Id.* at 667. By denying Ms. Bodnar the overtime that she would have earned but for Respondent's unlawful discharge of her, the arbitration award does not make her whole, and is thus repugnant to the Act.

Here, although the arbitrator found that the Respondent had no just cause for issuing discipline to Ms. Bodnar for refusing to participate in a postal investigation and ordered Respondent to reinstate Ms. Bodnar to her former position and that she be made whole with full back pay and benefits, the Arbitrator allowed Respondent to continue to penalize Ms. Bodnar by denying her overtime. The determination that Ms. Bodnar was not entitled to overtime was based solely on the fact that the union requested overtime as part of its remedy but presented no evidence to substantiate to the arbitrator that she would have worked overtime. The arbitrator fashioned her own reasoning for continuing to penalize Ms. Bodnar by denying her overtime as the local practice was not to present evidence of overtime eligibility at the arbitration. The Arbitrator's award is not susceptible to an interpretation consistent with the Act and thus fails the *Olin/Spielberg* deferral standard *supra*. Based thereon, General Counsel urges that the Administrative Law Judge not defer to the Arbitrator's award.

The Respondent may argue that similarly to Arbitrator Jacobs, other Postal Service arbitrators have excluded overtime pay from a make-whole remedy when no evidence of overtime eligibility had been presented at an arbitration. (Stipulation of Facts ¶19). Apparently, Respondent will contend that this will show that because there is precedent for not awarding overtime, it is proper to defer to the award in the instant case despite the omission of overtime. But the mere fact that other arbitration awards also excluded overtime from the relief granted to the grievant does not prove anything about whether those awards, yet alone the instant award, are repugnant to the Act. Simply put, there is no evidence that any of the awards cited by

Respondent were even reviewed by the Board, much less that the Board would have deferred to them. (Exhs. 12 & 13) Simply put, there is no evidence that the Board considered the precise issue of this case in the context of those other awards and found that that lack of overtime pay did not prevent deferral to the award. Thus, the awards have no probative value and do not prove that Arbitrator Jacobs's award is not repugnant to the Act.

B. The Board should consider modifying its approach to post-arbitral deferral and adopt a new standard.

In the alternative to the foregoing argument, General Counsel urges that the Board consider modifying its approach to post-arbitral deferral cases to give greater weight to safeguarding employees' statutory rights in Section 8(a)(1) and (3) cases.

Pursuant to Section 10(a) of the Act, the Board has a statutory mandate to protect individual rights and to protect employees from discharge and other forms of discrimination in retaliation for their protected activities, and that mandate cannot be waived by private agreement or dispute resolution agreement. Although portions of the Act favor the private resolution of labor disputes through processes agreed upon through collective bargaining, the Board should not abdicate its obligation to protect individual rights whenever employees and unions agree to a grievance arbitration process.⁴ Recent Supreme Court precedent concerning federal court jurisdiction over statutory claims that are also subject to arbitration agreements hold that courts are ousted of jurisdiction only where the arbitrator is authorized to decide the statutory issues and actually adjudicates

⁴ E.g., *Taylor v. NLRB*, 786 F.2d 1516, 1521-2 (11th Cir. 1986) ("by presuming, until proven otherwise, that all arbitration proceedings confront and decide every possible unfair labor practice issue, *Olin Corp.* gives away too much of the Board's responsibility under the NLRB."); *Bayard v. NLRB*, 505 F.2d 342, 347 (D.C. Cir. 1974) (the arbitral tribunal must have clearly decided the unfair labor practice issue on which the Board is later urged to give deference.)

such issues in a manner consistent with applicable statutory principles and precedent. ¹⁴ *Penn Plaza, LLC v. Pyett*, 129 S.Ct. 1456, 1469-71 (2009); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). The Acting General Counsel argues that this precedent and its rationale are compelling in determining the appropriate degree of deference that the Board should give arbitral awards.

Under this proposed new approach, the party urging deferral must demonstrate that: (1) the contract had the statutory right incorporated in it or the parties presented the statutory issue to the arbitrator; and (2) the arbitrator correctly enunciated the applicable statutory principles and applied them in deciding the issue. Only if the party urging deferral makes that showing, should the Board defer to the arbitrator's award unless it is clearly repugnant to the Act.

Thus, applying this new approach, General Counsel urges that the Board should not defer to the Arbitrator's Award which failed to make Ms. Bodnar whole by reinstating her with backpay and benefits while denying her overtime. Although the parties presented the statutory issue at the arbitration, the Arbitrator failed to correctly enunciate or apply the correct statutory principles as argued *supra*. For this reason and also because, as discussed above, the Arbitration Award is clearly repugnant to the Act, the Award is not entitled to deference under this proposed standard.

V. CONCLUSION

Catherine Bodnar was terminated because she refused to answer questions after she was denied union representation. The Arbitrator's award did not make Ms. Bodnar whole as it penalized her for Respondent's wrongful conduct and should not be deferred to as it is repugnant under current Board precedent. General Counsel urges that the Administrative Law

Judge consider a revised standard of deferral that gives more deference to the statutory rights of employees, and urges that deferral under this proposed standard would likewise be inappropriate.

CERTIFICATE OF SERVICE

The undersigned Counsel for the Acting General Counsel hereby certifies that true and correct copies of Counsel for the Acting General Counsel's Brief to the Administrative Law Judge has been electronically filed with the Division of Judges of the National Labor Relations Board on August 30, 2013. Pursuant to Section 102.114, revised on January 23, 2009, true and correct copies of that document have also been served on the same date upon the following parties of record via electronic mail as set forth below:

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Dated at Chicago, Illinois, this 30th day of August, 2013.

